



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. ----

MIKE GAULT and ALLEN GAULT, *Petitioners*,

vs.

STATE OF OKLAHOMA, Ex Rel., RANDELL S. COBB,
Attorney General.

Brief in Support of Petition for Writ of Certiorari

The decision of the Criminal Court of Appeals of the State of Oklahoma supporting conviction of the petitioners was filed on February 10, 1944, and is reported in 146 P.2d 133.

The petitioners were taken before the District Court of Custer County, Oklahoma, on the second day of July, 1938, and an information was filed at that time charging each of them with the crime of burglary, and the petitioner, Mike Gault, with the crime of assault with the intent to kill, and they were required to plead to the informations which had just been filed, without first having been informed of their right of the benefit of counsel before they were required to plead; their right to twenty-four hours after being arraigned in which to plead, and the court did not inform them as to the nature and cause of the accusations, but required them to plead immediately upon their arraignment. The court did not appoint a time, not less than two days for the pronouncement of judgment and sentence for judgment, but immediately sentenced

each of the defendants to serve a term of seven years, and the defendant, Mike Gault, to serve the term of ten years, in the Oklahoma State Penitentiary.

That the petitioners were then committed by the District Judge of Custer County to the sheriff of said county to be transported at the earliest convenience to the Oklahoma State Penitentiary.

That the petitioners were only before the District Court of Custer County the one time, and then only for a few moments, and less than one hour: That no attorney was appointed for them, and they did not have the benefit of counsel at any time during such proceedings.

That instead of the Sheriff of Custer County transporting the petitioners to the Oklahoma State Penitentiary, he transported them to Beckham County, Oklahoma, on the same day and immediately after they were committed to his charge for transportation to the penitentiary, and the petitioners were immediately taken before the District Judge of Beckham County, by the Sheriff of Custer County, Oklahoma, an information was immediately filed jointly charging the petitioners with the crime of robbery by use of firearms, which under the Oklahoma law constitutes a capital offense. That they were arraigned immediately after the filing of the information, and the information was read to them. That the Court did not inform the petitioners of their right to benefit of counsel before they should be required to plead; that a copy of the information was not served upon the petitioners; that the Court did not inform the petitioners the nature and cause of the accusation, but required them to plead and they thereupon entered pleas of guilty to the commission of the capital offense. That the court did not appoint a time, not less than two days thereafter, to pronounce judgment and sentence against the petitioners, but immediately rendered judgment against and sentenced the

petitioner, Mike Gault, to serve a term of thirty years in the Oklahoma State Penitentiary, and immediately pronounced judgment and sentence upon the petitioner, Allen Gault, to serve a term of thirty-three years at the Oklahoma State Penitentiary, and immediately committed the custody of the petitioners to the Sheriff of Custer County, Oklahoma, to be transported at the earliest convenience to the Oklahoma State Penitentiary at McAlester, Oklahoma, and the petitioners were transported by said sheriff to the Oklahoma State Penitentiary the same day, to-wit: July 2, 1938.

That the Fifth Amendment of the Constitution of the United States provides:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.”

That the Sixth Amendment of the Constitution of the United States provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense.*”

That Section One of the Fourteenth Amendment of the Constitution of the United States provides as follows:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State Deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*”

Section 7, of Article 2 of the Constitution of the State of Oklahoma, provides:

“No person shall be deprived of life, liberty, or property, without due process of law.”

Section 17, of Article 2, of the Constitution of the State of Oklahoma, provides:

“No person shall be prosecuted criminally in courts of record for felony or misdemeanor or otherwise than by presentment or indictment or by information. *No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint.*”

Section 20, of Article 2, of the Constitution of the State of Oklahoma, provides:

“In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed: Provided, that the venue may be changed to some other county of the State, on the application of the accused, in such manner as may be prescribed by law. *He shall be informed of the nature and cause of the accusation against him and*

have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his behalf.

He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their postoffice addresses."

Section 464 of Title 22, *Oklahoma Statutes 1941*, provides in part:

*"If the defendant appear for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and he must be asked if he desires the aid of counsel. * * *"*

Section 961 of Title 22, *Oklahoma Statutes 1941*, provides:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal, if the judgment is not arrested or a new trial granted, the court must appoint a time for pronouncing judgment."

Section 962 of said Title 22, *Oklahoma Statutes 1941*, provides:

"The time appointed must be at least two days after the verdict, if the court intend to remain in session so long; or if not, at as remote a time as can reasonably be allowed."

Section 517 of Title 22, *Oklahoma Statutes 1941*, provides:

"The court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted."

"Due process" requires that the procedure in criminal prosecution shall be in accord with that applicable to all civil and criminal trials, recognized in all common law jurisdiction, and that it does not result in arbitrarily depriving the defendants of any constitutional or common law rights. *Brown v. State*, 1935, 161 So. 465, 173 Miss. 542, overruling, 1935, 158 So. 339, 173 Miss. 542, certiorari granted *Brown v. State of Mississippi*, 1935, 56 S. Ct. 128, 296 U. S. 559, 80 L. Ed. 394, reversed on other grounds, 1936, 56 S. Ct. 461, 297 U. S. 278, 80 L. Ed. 682. Mandate of Supreme Court conformed to *Brown v. State*, 167 So. 82.

"Due process of law" is met if the trial in the criminal case is had according to the settled course of jurisdictional proceedings. It is necessary that the trial be in a court of competent jurisdiction under law that is not repugnant to the Constitution, and that the trial in such court be according to the rules, regulations and laws applicable to proceedings, in that jurisdiction, in the course of the administration thereof after opportunity is presented for hearing and defense. *U. S. ex rel. Mason v. Hunt*, D.C. N. Y. 1936, 16 F Supp. 285.

In order for there to be "due process of law," the State Court *must have acted in consonance with the constitutional law of the state and its own procedure. The accused must not have been deprived of any one of those fundamental rights, the observation of which is indispensable to his liberty.* The proceedings must not amount to a denial of any fundamental right or conflict with specific applicable provisions of the Federal Constitution. *Allen v. Georgia*, Ga. 1897, 17 S. Ct. 525, 166 U. S. 138, 41 L. Ed. 949.

"Due process of law" in the trial of a criminal case means that such trial is held according to the settled course of judicial proceedings. *State v. Palko*, 1937, 191

A. 320, 122 Conn. 529, 113 A. L. R. 628, affirmed *Polko v. State of Connecticut*, 1938, 58 S. Ct. 149, 302 U. S. 319, 82 L. Ed. 288.

In the decision against the petitioners the court made findings of facts prejudicial to the rights of petitioners which are more than anomaly and amount to a judicial finding without any evidence to support the same. The court evidently had in mind some other case, as it referred (R. 44) to affidavits of trial judge in which it said:

"As to their first proposition that they had no counsel, and were not advised of their right to counsel, their evidence is contradicted by the affidavit of the District Judge, T. R. Wise, who stated that he advised them fully of all their statutory and constitutional rights, but that said petitioners waived their right to counsel, their right for time in which to plead after arraignment, and their right for time for pronouncement of sentence after the plea of guilty was entered, and they each expressed a desire to enter a plea of guilty and be sentenced instanter. The sentence that was assessed the petitioners was based upon the recommendation of the County Attorney of Beckham County."

The reading of the decision of the court was the first information that the petitioners had of any such affidavits. The trial was a trial in open court, and the evidence of the petitioners consisted solely of the available records which they introduced and their testimony while on the stand. The State offered no evidence either in form of records, affidavits, or oral testimony.

Section 801, Title 21 of *Oklahoma Statutes*, 1941, provides:

"Any person or persons who, with the use of any firearms or any other dangerous weapons, attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence, or banking institution or any other place inhabited

or attended by any person or persons at any time, either day or night, shall be guilty of a felony, and, upon conviction therefor, shall suffer punishment by death, or imprisonment at hard labor, in the State Penitentiary, for a period of time of not less than five years, at the discretion of the Court, or the jury trying the same."

The Criminal Court of Appeals of the State of Oklahoma, held in *Ex Parte Barnett*, 94 P.2d 18, judgment and sentence void, the opinion in part being:

"In *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 A. L. R. 527, headnotes 10 and 11, are as follows: 'In a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.'

" 'A court has power, even in the absence of a statute, to appoint counsel to defend one charged with crime.'

"*Mr. Justice Sutherland delivering the opinion of the court said: 'The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise*

inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

"When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guarantee, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom petition for habeas corpus is addressed—should be alert to examine "the facts for himself when if true as alleged they make the trial absolutely void."'''

The decision of the Criminal Court of Appeals at-

tempts to satisfy the constitutional requirements of the preliminary examination when the accused were being tried on information for the commission of a capital offense, (R. 43) by stating that "*the testimony of petitioners contradicted that part of their petition which alleged that they did not have a preliminary examination as they each admitted that they were taken before a justice of the peace in each county and waived preliminary examination.*" The petitioners filed their duly verified petition (R. 1-5) denying that they had been afforded or had waived a preliminary hearing. It is significant that the filings in each of the counties in which the petitioners were each sentenced to long terms in the penitentiary could not be located and were not recorded (R. 6-7). The records are silent as to any preliminary hearing in either of the counties. The only trial docket or appearance docket in the District Court of Custer County (R. 7) consists of the filing of the information and certified copy of the judgment and sentence, and (R. 6) the minutes showing the arraignment, waiver of reading the information, plea and sentence and the only record of the proceedings in the District Court of Beckham County (R. 8) consists of a letter from the Court Clerk showing that the transcript by examining magistrate was missing but that a transcript complaint had been filed, and also the information (R. 9) charging the petitioners with the crime of robbery by use of firearms, a capital offense. The petitioners did not deny (R. 18-39) that they had been taken before an examining magistrate, but did deny that they had been afforded a preliminary examination or had waived same.

We respectfully urge that the petitioners have been denied their constitutional and statutory rights under the Constitution and laws of United States of America,

and under the Constitution and laws of the State of Oklahoma, and that the judgments and sentences entered and pronounced against them are void, and that the final decision of the Criminal Court of Appeals of the State of Oklahoma should be reversed.

All of which is respectfully submitted.

WILLIAM JOSEPH HULSEY, and
LENA HULSEY,

Counsellors for Petitioners.